1968

Virgil E. Norton v. Department of Employment Security, and Board of Review of The Industrial Commission of Utah : Brief of Respondents

IN THE SUPREME COURT OF THE STATE OF UTAH

VIRGIL E. NORTON, ~~*Appellant,*~~ Plaintiff

vs.

DEPARTMENT OF EMPLOYMENT SECURITY, AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, ~~*Respondents.*~~ Defendant

Case No. 11292

BRIEF OF RESPONDENTS

Appeal from the Order of the Board of Review of the Industrial Commission of Utah

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DEPARTMENT OF EMPLOYMENT SECURITY, AND BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, *Respondents.*

Case No. 11292

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an appeal from a decision of the Board of Review of the Industrial Commission which affirmed a decision of the Appeals Referee denying unemployment benefits to the appellant for the period commencing January 21, 1968, on the ground that he was registered at and attending school.

STATEMENT OF FACTS

There is no dispute as to the facts.

The appellant filed a claim for benefits effective January 21, 1968 (R-15). At that time he was attending

Westminster College full-time (R-16) and at the time of the hearing before the Appeals Referee on April 10, 1968, he was registered at and attending Westminster (R-17). The tuition fee was $403 a semester (R-17). During 1967 (his base year under the Employment Security Act) he was employed by Trane Company and was terminated from that employment on January 19, 1968 (R-15). During 1967 he earned wages in the amount of $5,229.52 (R-16). During that year he attended Westminster College during the periods January 1 to 27 and September 14 to December 31 (R-16). While attending school during his base period 1967 he earned $2,058.25 (R-3) (R-16-17).

ARGUMENT

POINT I

THE DEPARTMENT OF EMPLOYMENT SECURITY AND THE BOARD OF REVIEW PROPERLY APPLIED THE PROVISIONS OF THE EMPLOYMENT SECURITY ACT, CHAPTER 35-4 UCA TO THE FACTS OF THE CASE.

Benefits under the Act are computed on the basis of an individual's earnings during his base period. Section 35-4-22(b) defines the "base period" as follows:

> "35-4-22(b) The term 'base period' shall mean the four completed calendar quarters next preceding the first day of the individual's benefit year."

The term "benefit year" is defined as follows:

> "35-4-22(d)(1) The term 'benefit year' means the fifty-two consecutive week period beginning with the first week with respect to which an individual files for benefits and is found to have an insured status."

The appellant's "benefit year" commenced January 21, 1968 (R-15) and his base year became the four quarters of 1967. During 1967, he earned wages in the amount of $5,229.52 (R-16). While attending school during his "base period" 1967, he earned wages in the amount of $2,058.25 (R-03) which did not constitute the majority of his earnings during his "base period" so as to escape the statutory disqualification of Section 35-4-5(g) which provides:

> "35-4-5 An individual shall be ineligible for benefits or for purposes of establishing a waiting period:
>
> "(g) for any week in which he is registered at and attending an established school, or is on vacation during or between successive quarters or semesters of such school attendance; unless the *major portion of his wages for insured work during his base period was for services performed while attending school,* provided, however, that notwithstanding the provisions of this subsection an otherwise eligible individual shall not be ineligible to receive benefits while attending night school, a part-time training course, or a course approved by the commission; and provided further that satisfactory attendance and satisfactory progress in a course approved by the commission shall be evidence of availability." (Italics ours.)

Under the provisions of Section 5(g) therefore, the appellant was disqualified because he was registered at and attending school during the weeks in 1968 for which he was claiming benefits. He earned less than the major portion of his base period wages while attending school and there was no basis on which to find that the statutory disqualification for school attendance was removed. Had he not worked at all while attending school in 1967, he of course would also have been ineligible for benefits while attending school.

If during his benefit year (which commenced January 21, 1968) he ceases to attend school he will, if unemployed and able and available for work, be entitled to benefits upon making application on a week by week basis.

We agree with Counsel that in 1967 and part of January, 1968, the appellant worked full time. During the period for which he is claiming benefits he was *unemployed* and a *full-time student* and, as such, ineligible for benefits under the Act. The applicable provision of the Act was properly applied to the undisputed facts.

POINT II

SECTION 35-4-5(g), IS CONSTITUTIONAL AND DOES NOT VIOLATE ARTICLE 1, SECTION 2, OF THE CONSTITUTION OF UTAH OR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Utah Employment Security Act 35-4 UCA provides that certain classes of employers will pay unemployment compensation contributions into a fund based on the wages paid to certain classes of employments. The Act excludes certain other employments and employers. It disqualifies individuals who are not able and available for work and who are not unequivocally in the labor market and immediately ready to accept employment. It disqualifies persons on strike, and disqualifies pregnant women for certain weeks before and after childbirth.

In most respects, its definitions of employers, covered employments and disqualifications are similar to those of the several other states of the union. In Utah, as in most states, the employers alone pay contributions into the fund. Employees do not pay contributions. Their rights under the Act are purely statutory.

Prior to 1963, Section 5(g) read as follows:

> "(g) For any week in which he is attending an established school, excluding night school, national defense training course or a course designated by the commission, unless it can be shown to the satisfaction of the commission that he is unemployed through no fault of his own and that he is actively seeking work and will quit school to accept full-time work during customary working hours; provided that when the major portion of his wages for insured work during his base period was for services performed while attending school; the foregoing eligibility requirement that he will quit school to accept full-

> time work during customary working hours shall not apply; and provided further, that the provisions of this section shall not be construed as to grant benefits to an individual who is not available for substantially full-time work."

In 1963, for reasons not in the record, the Legislature amended Section 5(g).

Counsel for appellant on page 5 of his brief points out one probable reason for the amendment. He said, "It is easy to see that many abuses had arisen prior to the enactment of this act . . ." (meaning the 1963 amendment), "or could have arisen where a student, going to college on a *full-time* basis, would work during the summer months to earn enough money to go back to school, and because of his termination of his employment after summer employment then be entitled to unemployment compensation." (Italics ours.)

The Legislature acted within the scope of its authority in denying benefits to persons attending school unless they met certain requirements.

This Court in Combined Metals Reduction Company et al v. The Industrial Commission of Utah, 101 U. 230 116 P.2d 929, said:

> "Nor of course is it a mystery that there may be situations not covered by the act deserving of help."

The Court then quoted from the case of Carmichael v. Southern Coal and Coke Co., 301 US 495, 57 S. Ct. 868, 81 L. Ed. 1245, 109 A.L.R. 1327.

The Carmichael case is a landmark case dealing with the rights of State Legislatures to define employers, employments and unemployment benefit entitlements. It was argued before the Court that the state act in question was unconstitutional because it taxed some employers and not others; that it covered some employments and excluded others, and that benefits were not uniformly provided.

The United States Supreme Court in Carmichael (Supra) said:

> "(b) Extension of Benefits. The present scheme of unemployment relief is not subject to any constitutional infirmity, as respondents argue, because it is not limited to the indigent or because it is extended to some less deserving than others, such as those discharged for misconduct. While we may assume that the state could have limited its award of unemployment benefits to the indigent and to those who had not been rightfully discharged from their employment, it was not bound to do so. Poverty is one but not the only evil consequence of unemployment. Among the benefits sought by relief is the avoidance of destitution, and of the gathering cloud of evils which beset the worker, his family and the community after wages cease and before destitution begins.
>
> "(c) Restriction of Benefits. Appellees again challenge the tax by attacking as arbitrary the classification adopted by the legislature for the distribution of unemployment benefits. Only the employees of those subject to the tax share in the benefits. Appellees complain that the relief is

withheld from many as deserving as those who receive benefits. The choice of beneficiaries, like the selection of the subjects of the tax, is thus said to be so arbitrary and discriminatory as to infringe the Fourteenth Amendment and deprive the statute of any public purpose.

"What we have said as to the validity of the choice of the subjects of the tax is applicable in large measure to the choice of beneficiaries of the relief. In establishing a system of unemployment benefits the Legislature is not bound to occupy the whole field. It may strike at the evil where it is most felt (citing cases) or where it is most practicable to deal with it, (citing cases). It may exclude others whose need is less, (citing cases) or whose effective aid is attended by inconvenience which is greater (citing cases) . . .

"As we cannot say that these considerations did not lead to the selection of the classes of employees entitled to unemployment benefits, and as a state of facts may reasonably be conceived which would support the selection, its constitutionality must be sustained . . ."

In the case of Chamberlin vs. Andrews, 271 N.Y. 1, 2 NE 2d 22, 106 A.L.R. 1519, the court said:

"It is said that this is taxation for the benefit of a special class, not the public at large and thus the purpose is essentially private. The legislature after investigation, has found the facts to be that those who are to receive benefits under the act are the ones most likely to be out of employment in times of depression. The courts cannot investigate these facts and should not attempt to do so. The briefs submitted show that the clas-

sification or selection made by the legislature has followed investigation and has sought to reach the weakest spot. Experience may show this to be a mistake. No law can act with certainty; it measures reasonable probabilities.

"*Judicial inquiry does not concern itself with the accuracy of the legislative finding, but only with the question whether it so lacks any reasonable basis as to be arbitrary.*" (citing cases) (Italics ours.)

In Dominion Hotel, Incorporated v. State of Arizona, 249 U.S. 265, Mr. Justice Holmes said:

"The Fourteenth Amendment is not a pedagogical requirement of the impracticable. The equal protection of laws does not mean that all occupations that are called by the same name must be treated in the same way.

"The only question is whether we can say on our judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law. The deference due the judgment of the legislature on the matter has been emphasized again and again."

In the case of Acierno v. General Fireproofing, 144 NE 2d 201 (1957) the appellee claimant was attending Youngstown College on a nine-hour schedule.

Ohio law disqualified if he is:

" . . . or a student regularly attending an established educational institution during the school term or customary vacation periods within the school term."

Court said:

> "We are not confronted here with the proposition of an individual holding a part-time or full-time job while he is attending an established educational institution full time. Under such circumstances, the legislative intent comes through clearly that such an individual would be 'regularly attending' within the meaning of the law and, whatever view this court might have of the legislative policy of such a provision it would have no power to vary the clear intent of such policy."

The court then concluded that a student not taking a full-time course was not "regularly attending."

In Cornell v. Schroeder et al., 114 NE 2d 595, the claimant for benefits was denied unemployment compensation benefits while attending school. The statute disqualified:

> " . . . if he is a student regularly attending an established educational institution during the school term or customary vacation periods within the school term."

The court said:

> "The referee refused to recognize the applicability of that section to this record, largely on the ground that the settled policy of a liberal construction of the act justified a refusal of disqualification under the section.
>
> "This we find to be error . . . Section 1345 - 6 subd. c (9) Ohio General Code is very definite and unambiguous, and though this court can see

no reason why such a penalty should be attached to a desire for education, yet as long as the statute is there the court cannot judicially amend the law nor change its meaning when that statute is susceptible of only one interpretation."

Counsel argues that Section 5(g) is unconstitutional because it denies benefits to *day* students and permits the payment of benefits to those attending *night* school. (Brief 7, 8).

Section 5(g) does not deny benefits to individuals attending school in the daytime on a part-time basis or who are attending courses in the daytime which are approved by the commission.

When the appellant *registered* at Westminster and paid his tuition he became a *full-time* student (**R-17**).

Even though this Court were inclined to substitute its judgment for that of the legislature in determining whether the legislature had a reasonable basis for its enactment, it could not do so without making an independent investigation.

The record contains no evidence which would enable the court to compare night school students with day students attending part-time training courses or day students attending school full time.

Counsel for appellant (Brief, 9) says :

"There is no rational basis for singling out an employee who goes to night school from an employee who goes to day school."

His contention is not, and cannot be predicated on the record in this case. We do not have knowledge as to the rationale of the legislature or the considerations prompting its action.

The appellant in his appeal to the Appeals Referee stated the following grounds:

> "I agree that, according to the law, I am not eligible to draw benefits while I am in school. I do not agree with the law, and I am using this method to see what I can do about the law." (R-26).

Nor was the constitutional issue before the Board of Review. (See appellant's appeal (R-13).)

We do not question the right of counsel to raise the constitutional issue. This arises out of an administrative hearing at which counsel had no opportunity to assist in making a record which would enable this court to examine his argument that the legislature had no "rational basis" for the enactment of Section 5(g).

Counsel for Respondent are aware of the facts considered in the enactment of the section, but are, in the absence of such facts from the record, precluded from presenting an argument on those facts. We also will not make any assumptions.

In light of the Carmichael case (Supra) and the numerous cases cited therein the court cannot conclude that the facts considered by the legislature would not support its enactment of Section 5(g). It is the prerogative of the legislature and not the judiciary

to choose the beneficiaries of the Act. The legislature is free to decide where the impact of unemployment is greatest; where it is most practicable to deal with it; and whether an individual registered at and attending school full time is less entitled to unemployment benefits than are individuals attending night school, part-time training courses during nighttime or daytime, or courses approved by the commission.

SUMMARY

It is respectfully submitted that the law was properly applied to the facts and that the law does not violate the equal protection guarantees of the Utah and the United States Constitutions.

Respectfully submitted,

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